

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 309(j) and)
337 of the Communications Act of 1934)
as Amended)
)
Promotion of Spectrum Efficient Technologies)
on Certain Part 90 Frequencies)
)
Establishment of Public Service Radio)
Pool in the Private Mobile)
Frequencies Below 800 MHz)
)
Petition for Rule Making of The American)
Mobile Telecommunications Association)
)

WT Docket No. 99-87

To: The Commission

**OPPOSITION OF THE ASSOCIATION OF AMERICAN RAILROADS
TO PETITION FOR PARTIAL RECONSIDERATION**

The Association of American Railroads ("AAR"), by its undersigned counsel, pursuant to section 1.415 of the rules of the Federal Communications Commission ("Commission"),¹ hereby submits its opposition to the Petition For Partial Reconsideration of the Association of Public-Safety Communications Officials-International, Inc. (APCO), in the above captioned proceeding.²

¹ See 47.C.F.R. § 1.415.

² *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, WT Docket No.99-87, Report and Order and Further Notice of Proposed Rule Making, (FCC 00-403), (released November 20, 2000) ("Report and Order")*. Notice of the filing of APCO's Petition was published on February

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AAR is a voluntary, non-profit organization composed of Class I member railroad companies operating in the United States, Canada and Mexico. AAR is the joint representative and agent of these railroads in connection with federal regulatory matters of common concern to the industry as a whole, including matters pertaining to regulation of communications. AAR participated in the proceeding below.

1. Nature of the Railroads' Interest

The North American railroad industry deploys and depends upon a comprehensive and sophisticated network of fixed and mobile communications systems to carry voice and data traffic which is integral to the minute-to-minute management and control of train movements throughout the rail network. These systems are vital to ensuring safety on the nation's railroads. The railroads use mobile radio channels for transmitting voice and data communications to and from crews in locomotives and for controlling and monitoring rail switches and signals, and also for communications to, from, and among track workers and personnel assigned to maintaining the railroad right-of-way. The fixed point-to-point microwave systems are used to interconnect the trackside mobile radio facilities with the centralized dispatching center in each railroad's operating region. These systems also carry communications to advise of dangerous conditions and, if necessary, bring train movements to a halt to prevent unsafe operation. The radio communications links between trains and central

21, 2001. (See "*Petitions for Reconsideration and Clarifications of Action in Rulemaking Proceedings*," 66 Fed. Reg. 11031 (Feb. 21, 2001)).

dispatchers provide immediate information on the location, direction and speed of hundreds of trains operating at the same time on each major railroad in the nation, and are essential to protect railroad employees and the general public.

Because the railroads rely so heavily on radio communications to ensure the safe and efficient operation of the nation's railways, AAR has a vital interest in this proceeding.³

2. The Report and Order

In the Report and Order, the FCC adopted rules and policies to implement Sections 309(j) and 337 of the Communications Act of 1934 ("Communications Act"), as amended by the Balanced Budget Act of 1997 ("Balanced Budget Act").⁴

Pertinent hereto, the Commission addressed issues relating to Section 337 of the Communications Act, which, *inter alia*, provides certain public safety entities the opportunity to apply for unused spectrum not otherwise allocated for public safety use. In particular, the Commission held that a favorable finding under Section 337(c)(1)(A) could be made only if the requesting party

³ AAR's interest in this proceeding also arises as a result of an informal request by a particular public safety entity to use certain VHF frequencies that are earmarked as "LR" in Section 90.35 of the Commission's rules, notwithstanding the availability of huge amounts of public safety spectrum in other bands in the particular geographic area. If granted, such a request would have a serious detrimental effect on the ability of the railroad industry to carry out its planned nationwide transition to a narrowband digital technology. See Comments of AAR filed on March 5, 2001 in response to the Commission's *Further Notice of Proposed Rulemaking* (RM-9705) which accompanied the Report and Order in this proceeding.

⁴ Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

demonstrates that there is no available public safety spectrum in any band in the geographic area where the public safety use is proposed.

3. **The Nature of APCO's Petition For Partial Reconsideration**

APCO takes issue with the Commission's interpretation of Section 337(c)(1)(A).⁵ Specifically, APCO claims that to the extent the Commission interpreted Section 337(c)(1)(A) to require an applicant to demonstrate that there is no available public safety spectrum *in any band* before a waiver can be granted, then its interpretation is contrary to the plain language of the statute. Essentially, APCO argues that Section 337(c)(1)(A) should be interpreted to require a showing that no public safety spectrum is available to satisfy the applicant's requested use *in the same band* as the frequencies being requested, not a showing, as the Commission declared, that no other public safety spectrum is available *in any frequency band*. APCO contends that the Commission's interpretation (1) is contrary to the plain language of the statute, (2) disregards concerns about interoperability, and (3) ignores the propagation characteristics and cost considerations inherent in different frequency bands.

For the reasons set forth below, APCO's Petition for Partial Reconsideration should be denied.

⁵ APCO also seeks reconsideration of the Commission's interpretation of Section 337(c) in circumstances where procedures for auctioning a particular spectrum block have been initiated. AAR's Opposition does not address that aspect of APCO's petition.

4. **The Commission's Interpretation Is Consistent With the Plain Language of the Statute, the Legislative Intent, and Well Established Agency Precedent.**

Section 337(c) provides that the Commission shall waive any provision of its rules to the extent necessary to permit use of unassigned spectrum for the provision of public safety services if five conditions are met. The five conditions are spelled out in Section 337(c)(1), the first of which is that "(A) no other spectrum allocated to public safety service is immediately available to satisfy the requested public safety service use." The Commission correctly interpreted the foregoing to mean that an applicant is not eligible for a statutory waiver if spectrum is available for the intended use in *any* frequency band allocated for public safety.⁶

APCO's argument that the Commission misinterpreted Section 337(c)(1)(A) is three-fold. First, APCO claims that the Commission ignored the phrase "to satisfy the requested public safety service use." According to APCO, this phrase means that the FCC must consider the nature of the "requested use" and determine whether otherwise available public safety spectrum in other bands would be "feasible" for satisfying the intended use.⁷ But that is not what the statute says, and a close look at the language of Section 337(c)(1)(A) reveals that APCO's position is flawed. The phrase relied upon by APCO ("to satisfy the requested public safety use") is not limiting in nature, but is merely a narration of

⁶ *Report and Order* at para. 132.

⁷ APCO Petition at 4.

the purpose of the spectrum request being made by a public safety entity seeking a statutory waiver. If Congress had intended to limit or qualify the phrase “no other spectrum” as suggested by APCO, it could have inserted words such as “in the same band as the frequencies being requested,” or it could have spelled out the “feasibility” criteria regarding use of other bands. But Congress did neither, and the statutory language as enacted is unqualified and unconditional as to the requirement that there be no other spectrum allocated to public safety services -- ***in any band*** -- to satisfy the requested use.

The legislative history of Section 337(c)(1)(A) confirms that the Commission’s interpretation is the correct one. In the Conference Report accompanying the enactment of Section 337, the conferees stated with respect to Subsection (c)(1)(A) that “spectrum must not be immediately available on a frequency already allocated to public safety services.”⁸ Assuming, *arguendo*, that ambiguity exists concerning the meaning of the statutory language itself, the Conference Report is utterly devoid of ambiguity: the words “spectrum” and “frequency” are not qualified, modified or conditioned in any way. Thus, the legislative history clearly supports the Commission’s interpretation, not APCO’s.

The second argument advanced by APCO is that the Commission’s interpretation of Section 337(c)(1)(A) “will undermine interoperability,” citing as support the Commission’s emphasis on interoperability in *South Bay Regional*

⁸ H.R. Conf. Rep. No. 217-105th Cong., 1st Sess., 580 (1997). APCO urges that the Conference Report not be relied upon to defeat “the plain meaning of the statute.” APCO Petition at n. 2. But it is APCO’s interpretation, not the Commission’s or that of the Conference Report, that flies in the face of the plain meaning of the statute.

Public Safety Communications Authority.⁹ But contrary to APCO's reliance on that case, the facts in *South Bay* support the Commission's interpretation, not APCO's. In that case, the applicant was seeking use of frequencies in the UHF band (470-512 MHz), and submitted not only a study by a consulting engineer showing that **all** Part 90 public safety frequencies in the area were unavailable, but also a statement from the local frequency coordinator certifying that there were "no [public safety] UHF, VHF or 800 MHz channels" available to the applicant. That led the Commission to conclude with respect to the showing under Section 337(c)(1)(A) that "no other public safety spectrum is immediately available in the Los Angeles area,"¹⁰ a conclusion that was fully in accord with the Commission's interpretation set forth in the Report and Order. APCO's reliance on the *South Bay* case in support of its attempt to introduce interoperability as a factor under Section 331(c)(1)(A), is misplaced. In that case, the Commission's discussion of the interoperability factor was wholly within the context of the **fifth** condition set forth in Section 337(c)(1), namely Subsection (E) which requires that a grant of the waiver "be in the public interest."¹¹ Interoperability was not a factor in the Commission's discussion of Section 337 (c)(1)(A).

⁹ Memorandum Opinion and Order, 13 FCC Rcd 23781 (1998), at para. 40. APCO Petition at 4-5.

¹⁰ *South Bay*, *supra* at 23796, para. 34.

¹¹ *Id.* at 23798, paras. 39, 40.

APCO's third argument is that the Commission's interpretation "overlooks the reality of public safety system design," insofar as different frequency bands have different propagation characteristics and, consequently, different cost considerations.¹² In this regard, APCO claims that public safety users in large, sparsely populated states would face "enormous equipment, site acquisition, and construction costs" if they were to use frequencies above 470 MHz.¹³ Again, APCO tries to read more into the statutory language than the actual words of Section 337(c)(1)(A) will support. The plain language of section 337(c)(1)(A) reveals no mention whatsoever of economic or financial considerations, not to mention propagation characteristics. Certainly, had Congress intended such meaning, it could have included qualifying language to that effect.¹⁴

5. Conclusion

AAR respectfully submits that the Commission's interpretation of Section 337(c)(1)(A) is fully consistent with the plain meaning of the statutory language, is consistent with the legislative history and intent as expressed in the Conference Report, and comports with prevailing Commission case precedent

¹² APCO Petition at 6.

¹³ *Id.*, referring to the fact that higher frequencies have shorter propagation distances and would therefore require a greater number of base stations (at greater overall system cost) to achieve comparable coverage.


¹⁴ Congress could have said, for example, that the applicant must show that "no other spectrum allocated to public safety services is immediately available to satisfy *in a cost-efficient manner* the requested public safety service use." Congress did not do so.

where that section has been applied. Accordingly, APCO's Petition for Partial Reconsideration of the Commission's interpretation of Section 337(c)(1)(A) should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre A. Johnson, a secretary for the law firm of Verner, Liipfert, Bernhard, McPherson, and Hand, Chartered, hereby certify that I have this 8th day of March, 2001, caused a copy of the foregoing "Opposition" to be sent, via First Class, United States Mail, postage prepaid to each of the following:

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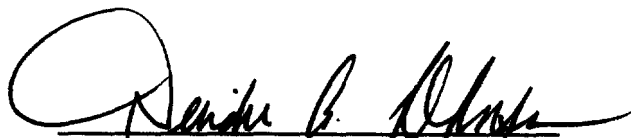
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